

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION**

THE STATE OF LOUISIANA,
By and through its Attorney General, JEFF
LANDRY; ET AL,

PLAINTIFFS,

v.

XAVIER BECERRA, in his official capacity
as Secretary of Health and Human Services; et
al.,

DEFENDANTS.

CIVIL ACTION No. _____

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The Biden Administration has quadrupled down on its lawless mandates. Despite a barrage of court orders enjoining its first three vaccine mandates, the Administration has refused to rethink its “sledgehammer” approach. *BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab.*, 17 F.4th 604, 612 (5th Cir. 2021). To the contrary, it has enacted a new Mandate materially similar to—and in some ways more draconian than—its first three. The Head Start Mandate applies to all preschool programs funded by the federal Head Start program, regulating hundreds of thousands of educators and toddlers nationwide. It forces vaccinations on educators and masks on everyone age two and up. It includes few exceptions, could lead to tens of thousands of educators losing their jobs, imposes immediate budgetary costs on States, and will cause preschool programs around the country to close or reduce capacity—achieving the very *opposite* result of its purported goal. The Department of Health and Human Services enacted the Head Start Mandate 82 days after announcing its intent to do so, but made the Mandate effective immediately and (like the other three federal vaccine mandates) bypassed notice and comment.

The Head Start Mandate is unlawful. It exceeds the executive’s statutory authority; is contrary to law; illegally bypassed notice and comment; is arbitrary and capricious; constitutes an exercise of legislative power in violation of the Nondelegation Doctrine; and violates the Congressional Review Act, the Tenth Amendment, the Anti-Commandeering doctrine, the Spending Clause, and the Treasury and General Government Appropriations Act of 1999. It will wreak havoc on educators and low-income families and should be enjoined.

BACKGROUND

I. THE HEAD START PROGRAM.

Through its Head Start program, the Department of Health and Human Services and the Administration for Children and Families fund public, non-profit, and for-profit providers of

preschool education for children from low-income families. *See* 42 U.S.C. §§9831 et seq. *See, e.g., Doe v. Woodard*, 912 F.3d 1278, 1286 n.2 (10th Cir. 2019) (“Head Start primarily functions as an educational institution for very young children”). Head Start “improves educational outcomes—increasing the probability that participants graduate from high school, attend college, and receive a post-secondary degree, license, or certification.” Diane Whitmore Schanzenbach and Lauren Bauer, *The long-term impact of the Head Start program*, Brookings (Aug. 19, 2016), <https://brook.gs/3lQ6JNY>.

All States have Head Start programs. Some States run their Head Start programs directly and receive Head Start funds directly from the federal government. *See, e.g., Exs. B, O.*

II. THE BIDEN ADMINISTRATION’S VACCINE AND MASK POLICY.

As President-Elect, Mr. Biden “d[id]n’t think [vaccines] should be mandatory.” Jacob Jarvis, *Fact Check: Did Joe Biden Reject Idea of Mandatory Vaccines in December 2020*, Newsweek (Sept. 10, 2021), <https://bit.ly/3ndyTn5>. Once he took office, his Administration’s policy was: “The government is not now, nor will we be supporting a system that requires Americans to carry a [vaccine] credential.” *See* Press Briefing by Press Secretary Jen Psaki, April 6, 2021, <https://bit.ly/3rBJVoL>. Mr. Biden also took the position that as President, “I cannot mandate people wearing masks.” *Transcript of CNN Presidential Town Hall with Joe Biden*, CNN, Sept. 17, 2020, <https://cnn.it/3rFcxNZ>. And his Administration “initially chose ... to allow Head Start programs to decide whether or not to require staff vaccination rather than require vaccination.” *See Vaccine and Mask Requirements to Mitigate the Spread of COVID–19 in Head Start Programs*, 86 Fed. Reg. 68052, 68054 (Nov. 30, 2021).

But as time passed, the President announced that his “patience” began “wearing thin” with those “who haven’t gotten vaccinated.” White House, *Remarks by President Biden on Fighting the*

COVID-19 Pandemic (Sept. 9, 2021), <https://bit.ly/3Ey4Zj6>. He also called the concerns of those opposed to mask mandates “ugly” and “wrong.” *Id.* So his Administration announced an unprecedented series of federal mandates. Among other things, President Biden announced that he would impose—through unilateral executive action—a vaccine mandate on “all of nearly 300,000 educators” in Head Start programs. *Id.* President Biden declared that he was “tak[ing] on elected officials and states” and that he would “use my power as President to get them out of the way.” *Id.*

III. THE HEAD START MANDATE.

Over two months later, on November 30, 2021, HHS published an interim final rule requiring (1) vaccination of Head Start educators and (2) masking of all Head Start adults and children two years or older. *See* 86 Fed. Reg. 68052.

The Head Start Mandate’s vaccine requirement demands that a wide range of Head Start personnel—all staff, all contractors who come into contact with or provide direct services to children and families, and all volunteers in classrooms or working directly with children—submit to full COVID-19 vaccination. 86 Fed. Reg. at 68101; 45 C.F.R. §§1302.93(a)(1), 1302.94(a)(1). It *currently* defines full vaccination as the primary doses of an approved vaccine. *See* 86 Fed. Reg. at 68060. Other than for those who can establish a medical exception and those entitled to accommodation under existing federal law, the Mandate provides no alternative to vaccination. 45 C.F.R. §§1302.93(a)(1); 1302.94(a)(1). For those who qualify for an exemption, the Program must conduct, track, and document testing weekly (at least) and must use existing funds to do so.

The Head Start Mandate’s masking requirement forces all children two years old and older and all adults to wear masks (1) “indoors in a setting when Head Start services are provided,” (2) “for those not fully vaccinated”—which includes all preschool-age children—“outdoors in crowded settings or during activities that involve sustained close contact with other people”, and

(3) in a Head Start vehicle with another person. 86 Fed. Reg. at 68101; 45 C.F.R. §1302.47(b)(5)(vi) (“the Toddler Mask Mandate”). Children and toddlers may take off their masks only when eating, drinking, or napping. *Id.* §1302.47(b)(5)(vi). All adults and toddlers must submit to the mask requirement unless they are already protected by federal disability law, a religious exemption, or “a child’s health care provider advises an alternative face covering to accommodate the child’s special health care needs.” *Id.* §1302.47(b)(5)(vi)(C)-(D).

HHS made the Toddler Mask Mandate enforceable immediately and the vaccine requirements enforceable on January 31, 2022. 86 Fed. Reg. at 68052. A person is considered fully vaccinated two weeks after completing a primary vaccination series, which can itself take several weeks to complete. *Id.* at 68060; *Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs* at 15, Office of Head Start (Dec. 2, 2021), <https://bit.ly/3Gw4Sp8> (recommending first shot by January 3, 10, or 31, depending on vaccine). The Head Start Mandate includes no exception for people with natural immunity and no exception for people who test negative for COVID-19 before entering school each day. If a Head Start provider does not comply with the Mandate, HHS must initiate proceedings to terminate its funding. 42 U.S.C. §9836a(e)(1)(C).

IV. THE HEAD START MANDATE’S EFFECT ON FAMILIES, PROVIDERS, AND STATES.

According to HHS, the Head Start Mandate targets 273,000 staff, up to one million volunteers, and up to 864,289 children at America’s 20,717 Head Start Centers. 86 Fed. Reg. at 68068-69, 68077. It applies to staff regardless of whether they work in-person or remotely. HHS estimates that the vaccine requirements will force 29,953 staff to submit to the vaccine and 11,519 staff to lose their jobs. *Id.* at 68077-78. The National Head Start Association surveyed Head Start programs and found that over one-fourth of Head Start programs anticipate losing more than 30%

of their staff. Ex. A at 3. That number will increase as the definition of “fully vaccinated” expands. Meanwhile, the masking requirement of the Head Start Mandate would force practically all of the 864,289 children subject to it to either submit to masking or surrender their place in Head Start. And it would force all of the 273,000 staff and nearly one million volunteers to either submit to masking or leave Head Start. HHS did not indicate how many children, staff, or volunteers would leave the program due to the Head Start Mandate.

As a result of the Head Start Mandate, staff and volunteers will likely leave the Head Start program, certain providers will close, and low-income children in affected areas will be denied access to the preschool education that Congress guaranteed them. *See* Exs. A-N, O-R. Some parents are removing their children from Head Start programs because of the Mandate’s masking requirements. *See* Exs. I, G, O. States have direct and indirect interests in the Head Start grant program. Some States directly participate as grantees but also enforce Head Start standards. *See* Exs. B, O. All States have Head Start programs, which are important safety-net education programs for pre-school aged children that improve educational readiness for entry into Kindergarten, but also provide critical health and social support resources to families that States would have to find funding to backfill. Head Start funds sometimes go directly to public schools with preschool programs, and the States will be harmed by the loss of staff, children, and funding at those schools. *See* Exs. C, G, P. States also have *parens patriae* interests in protecting some of the most vulnerable people in their communities: children in poverty. States have long relied on Head Start as an integral part of the safety net and education services. *See* Compl. ¶¶42-57.

ARGUMENT

To obtain a preliminary injunction, Plaintiffs “must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that the injunction might cause to the defendant;

and (4) that the injunction will not disserve the public interest.” *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 288 (5th Cir. 2012). Each factor weighs in Plaintiffs’ favor.

I. PLAINTIFF STATES ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

The Vaccine Mandate suffers from a panoply of fatal procedural and substantive flaws.

Each suffices to justify enjoining it.

A. The Head Start Mandate Is Beyond the Executive’s Authority and Contrary to Law

1. The Mandate Is Beyond the Executive’s Authority.

The Head Start Mandate is a federal action involving issues of major economic, social, and political significance. The Mandate regulates approximately a million children and hundreds of thousands of staff and volunteers. It also affects hundreds of millions of dollars in funding. *Cf. Louisiana v. Becerra*, 2021 WL 5609846, at *11 (W.D. La. Nov. 30, 2021) (“mandat[ing] COVID-19 vaccines for over 10.3 million healthcare workers” is “[c]ertainly” a “decision of vast economic and political significance”).

The Fifth Circuit Court of Appeals and courts around the country have held that COVID-19 mandates are plainly measures of immense importance and trigger the Major Questions Doctrine. *See, e.g., BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, 617 (5th Cir. 2021). And courts have consistently found that COVID-19 mandates push the limits of congressional authority under the Nondelegation Doctrine and Tenth Amendment. *See, e.g., Louisiana*, 2021 WL 5609846, at *15. Accordingly, the Head Start Mandate must be authorized by a clear statement of unambiguous congressional intent. *See Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021); *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, 617 (5th Cir. 2021). It isn’t.

In fact, HHS cites only one provision of law as authorizing the mandate, and that comes nowhere close to the clear statement needed. Section 641A, codified at 42 U.S.C. §9836a(a)(1)(C)-(E), authorizes the Secretary to only “modify, as necessary ... administrative and financial management standards,” “standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate) for such agencies, and programs,” and “such other standards as the Secretary finds to be appropriate.” 42 U.S.C. §9836a(a)(1)(C)-(E). It does not grant express authority to impose the Head Start Mandate. The Mandate is not an “administrative and financial management standard[.]” Indeed, HHS does not even pretend that it is. It is not a “standard relating to the condition and location of facilities,” which, as the specification of “indoor air quality assessment” demonstrates, refers to physical conditions and locations of Head Start facilities rather than conditions on participation, employment, and volunteer eligibility. Finally, the general “other standards as the Secretary finds to be appropriate” clause cannot be relied upon as authority given the major questions implicated and the difference between a vaccine and masking mandate and the other authorities specifically enumerated. *See Louisiana*, 2021 WL 5609846, at *10 (W.D. La. Nov. 30, 2021) (“Not only do the statutes not specify such superpowers, but principles of separation of powers weigh heavily against such powerful authority being transferred to a government agency by general authority.”); *see also id.* at *7 (employing the *noscitur a sociis* canon to avoid “giving unintended breadth to Acts of Congress”). Just as the term “necessary” does not convey power to OSHA, *BST Holdings*, 17 F.4th at 613, or to CMS, *Louisiana*, 2021 WL 5609846, at *10, to impose a COVID mandate, the term “appropriate” is not an express grant of authority required for HHS to impose such a mandate, *see id.* at *11 (“Certainly, CMS does not have this authority by a general authorization statute.”).

Beyond that, in enacting the Head Start Mandate, the Secretary is not “modifying, as necessary,” any standards. *See* 42 U.S.C. §9836a(a)(1). The Supreme Court’s holding in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.* that a statute authorizing the Federal Communications Commission to “modify any requirement” for tariff filing did not authorize the challenged regulation because it effected a fundamental change rather than a “modification” is indistinguishable and controlling. 512 U.S. 218 (1994). The word “modify” means (1) “To make somewhat different; to make small changes to (something) by way of improvement, suitability, or effectiveness,” (2) “To make more moderate or less sweeping; to reduce in degree or extent; to limit, qualify, or moderate,” or (3) “To describe the or limit the meaning of.” *Modify*, Black’s Law Dictionary (10th ed. 2014); *see also* Random House Dictionary of the English Language 1236 (2d ed. 1987) (“to change somewhat the form or qualities of; alter partially; amend”); Webster’s Third New International Dictionary 1452 (1981) (“to make minor changes in the form or structure of: alter without transforming”); 9 Oxford English Dictionary 952 (2d ed. 1989) (“[t]o make partial changes in; to change (an object) in respect of some of its qualities; to alter or vary without radical transformation”). As the Court explained in *MCI Telecommunications*, “[v]irtually every dictionary we are aware of says that ‘to modify means to change moderately or in a minor fashion.’ 512 U.S. at 225; *see also id.* at 228 (holding that “[m]odify’ ... connotes moderate change”). Accordingly, the term “modify” in the Head Start Act does not empower the Secretary to enact sweeping and unprecedented mandates governing the bodily autonomy of hundreds of thousands of people and effectively exiling a substantial number of educators and children from Head Start until they kowtow to the President’s wishes.

In sum, the Head Start Mandate is not authorized by a shred of statutory authority—much less the clear statement necessary to wade into a matter of immense public importance and push the limits of congressional and federal power.

2. The Mandate Is Contrary to Law.

The Head Start Mandate not only lacks clear congressional authorization—it violates several provisions of the Head Start Act. *First*, the Mandate violates the Head Start Act’s text and structure. The Head Start program’s purpose is “to promote the school readiness of low-income children by enhancing their cognitive, social, and emotional development.” 42 U.S.C. §9831. And the program has been reauthorized several times for the purpose of expanding eligibility and enrollment. *See, e.g.*, Improving Head Start for School Readiness Act of 2007 (P.L. 110-134). The Head Start Mandate directly contravenes the fundamental reason the Head Start program exists. It has decreased student enrollment already and will continue to do so. *See* Exs. G, I, O. It will decrease staff and volunteer levels, which will harm the school readiness of low-income children. *See* Exs. B, C, D, P. And the Act’s structure is designed to ensure that HHS cannot issue measures that harm student well-being or decrease enrollment. *See* 42 U.S.C. §§9836a(a)(2)(C)(ii) (no reduction in quality of education/care), (b)(3)(B) (no reduction in enrollment). The Mandate will thus harm precisely the children Congress established Head Start to help. *Cf. Louisiana*, 2021 WL 5609846, at *13 (“Requiring COVID-19 vaccinations to healthcare workers covered by the mandate would hurt the patients the Social Security Act was meant to help.”).

Second, the Mandate violates 42 U.S.C. §9836a(a)(2)(B)(x), which requires the Secretary to “take into consideration ... the unique challenges faced by individual programs, including those programs that are seasonal or short term and those programs that serve rural populations.” HHS nowhere mentions the impact of the Mandate on rural areas.

Third, the Mandate violates 42 U.S.C. §9836a(2)(A), which requires that the Secretary “shall consult with experts in the fields of child development, early childhood education, child health care, family services (including linguistically and culturally appropriate services to non-English speaking children and their families), administration, and financial management, and with persons with experience in the operation of Head Start programs.” The Secretary did not do so. And his consultation with “experts in child health, including pediatricians, a pediatric infectious disease specialist, and the recommendations of the CDC and FDA,” 86 Fed. Reg. at 68054, comes nowhere close to meeting §9836a(2)(A)’s specific requirements. HHS also failed to meet §9836a(2)(A)’s requirements because it failed to disclose who specifically it actually consulted.

Fourth, the Mandate violates 42 U.S.C. §9836a(a)(2)(C)(ii), which requires the Secretary to “ensure that any such revisions in the standards will not result in the elimination of or any reduction in quality, scope, or types of health, educational, parental involvement, nutritional, social, or other services required to be provided under such standards as in effect on December 12, 2007.” By excluding children and reducing eligible staff and volunteers, the Mandate will result in the reduction of the quality, scope, and types of health, education, parental involvement, nutrition, social, and other services provided to students. *See, e.g.*, Ex. P.

Fifth, the Mandate violates 42 U.S.C. §9836a(b)(3)(B)’s fundamental command that measures promulgated under the authority of Section 641A “shall not be used to exclude children from Head Start programs.” That is precisely the Mandate’s purpose—excluding the children of parents who refuse to have their children comply with the masking requirement. And children are already being excluded from Head Start programs due to the Mandate. *See* Exs. G, I, O, P; Andrea Johnson, *Head Start must close classrooms, fire staff due to federal COVID-19 vaccine mandate*, Minot Daily News (Dec. 10, 2021), <https://bit.ly/3ykUvBT>.

B. The Head Start Mandate Violates the APA’s Notice-and-Comment Requirement.

The Administrative Procedure Act requires agencies to publish notice of all “proposed rule making” in the Federal Register, 5 U.S.C. §553(b), and to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments,” *id.* §553(c). HHS acknowledges that the Mandate is a legislative rule that normally would have to go through the APA’s notice-and-comment procedures and admits that it did not receive the benefit of notice and comment. 86 Fed. Reg. at 68058. HHS tries to justify this failure by invoking the incredibly narrow “good cause” exception to the APA’s notice-and-comment requirement.

Nearly every court nationally—and every Fifth Circuit court—to consider a claimed good-cause exception to notice and comment has rejected it in the COVID-19 context. *See, e.g., Louisiana*, 2021 WL 5609846, at *9 (collecting cases). This reflects the fundamental principle that the “good cause exception [is] ‘meticulous and demanding,’ ‘narrowly construed,’ ‘reluctantly countenanced,’ and evoked only in ‘emergency situations.’” *Id.* HHS’s cursory good-cause analysis comes nowhere close to establishing good cause.

HHS states that although “COVID-19 cases, hospitalizations and deaths have begun to trend downward at a national level,” notice and comment must be avoided because of the “threat to the country’s progress on the COVID-19 pandemic” posed by the unvaccinated. 86 Fed. Reg. at 68058-59. But this justification amounts to no more than a claim of administrative inconvenience—precisely the justification courts have repeatedly rejected. *See, e.g., United States v. Johnson*, 632 F.3d 912, 929 (5th Cir. 2011) (“[T]he good cause exception should not be used to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them.”); *Ass’n of Cmty. Cancer Ctrs. v. Azar*, 509 F. Supp. 3d 482, 498 (D. Md. 2020) (“[A]n agency may not dispense with notice and comment procedures merely because it wishes to

implement what it sees as a beneficial regulation immediately.”). Indeed, this Court and the Fifth Circuit have rejected precisely the same claims of exemption from APA and other notice-and-comment requirements. *See BST Holdings*, 17 F.4th at 611-12 (“The Mandate’s stated impetus—a purported ‘emergency’ that the entire globe has now endured for nearly two years, and which OSHA itself spent nearly two months responding to—is unavailing as well.”); *Louisiana*, 2021 WL 5609846, at *10.

And HHS’s concerns about the onset of winter and flu season represent a crisis of its own making, which is not sufficient to establish good cause. *See, e.g., United States Steel Corp. v. EPA*, 595 F.2d 207, 213-14 & n. 15 (5th Cir.1979); *see also NRDC v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004) (“We cannot agree ... that an emergency of [an agency’s] own making can constitute good cause.”). HHS waited months to issue this supposedly emergency measure. This delay does not constitute good cause “because ‘[o]therwise, an agency unwilling to provide notice or an opportunity to comment could simply wait until the eve of a statutory, judicial, or administrative deadline, then raise up the good cause banner and promulgate rules without following APA procedures.’” *NRDC v. NHTSA*, 894 F.3d 95, 114-15 (2d Cir. 2018) (collecting cases); *see also Louisiana*, 2021 WL 5609846, at *10 (“It took CMS almost two months, from September 9, 2021, to November 5, 2021, to prepare the interim final rule at issue. Evidently, the situation was not so urgent that notice and comment were not required. It took CMS longer to prepare the interim final rule without notice than it would have taken to comply with the notice and comment requirement. Notice and comment would have allowed others to comment upon the need for such drastic action

before its implementation.”). Accordingly, Defendants failed to adhere to the APA’s vital notice-and-comment rulemaking procedures without sufficient justification.¹

C. The Head Start Mandate Is Arbitrary and Capricious.

Federal administrative agencies are required to engage in reasoned decision-making. *Louisiana*, 2021 WL 5609846, at *12. “[A]gency action is lawful only if it rests on a consideration of the relevant factors” and “important aspects of the problem.” *Michigan v. EPA*, 576 U.S. 743, 750-52 (2015) (requiring “reasoned decisionmaking”). The Mandate is arbitrary and capricious for several independently sufficient reasons.

First, the Mandate will shrink the number of eligible students, staff, and volunteers, undermining the Head Start Act’s focus on student enrollment, education, and wellbeing. *See* 42 U.S.C. §9831. Each prong of the President’s vaccination policy is aimed at the same overarching goal: increasing individual vaccination rates in society. *See Remarks by President Biden on Fighting the COVID-19 Pandemic* (Sept. 9, 2021), <https://bit.ly/3oI0pKr> (Head Start Vaccine Mandate part of President’s plan to “increase vaccinations among the unvaccinated with new vaccination requirements”). But it will exacerbate staff shortages. *Cf. Louisiana*, 2021 WL 5609846, at *12 (“The Plaintiff States further maintain the goal of the CMS Mandate is to increase individual vaccine rates, which will actually have the effect of harming patient well-being due to staff shortages of providers and suppliers.”). As discussed above, the Mandate would cause Head Start programs to fire at least 11,519 staff and 42,000 volunteers. The Mandate-caused staff and volunteer shortages will be detrimental to child education. *See, e.g., Chad Frey, Vaccine mandate*

¹ For the same reasons, CMS’s reliance on the good-cause exception to avoid the Congressional Review Act’s procedures was unlawful. *See* 5 U.S.C. §808; *see also* OMB, *Guidance on Compliance with the Congressional Review Act*, M-19-14 (Apr. 11, 2019) (noting APA good-cause standard applies in CRA context).

affecting Newton Head Start staff, The Kansan (Nov. 9, 2021), <https://bit.ly/3oB1dQL>; Adam Kurtz, *Mayville State University's Head Start program could be impacted by vaccine mandate*, Grand Forks Herald (Dec. 9, 2021), <https://bit.ly/3oFENOA> (“Van Horn said he was concerned about being able to maintain services for all of those children if the mandate remains in place.”).

What’s more, the Toddler Mask Mandate would force practically all of the 864,289 children subject to it to either submit to masking or surrender their place in Head Start. And HHS did not indicate how many children, staff, or volunteers would leave the program due to the Mandate. The inevitable drop in students whose parents are unwilling to comply with the Mandate’s requirements will undermine the Act’s central focus on maintaining student enrollment. *See* 42 U.S.C. §9836a(b)(3)(B) (“Such measures shall not be used to exclude children from Head Start programs.”); *see* Tyler Brown, *Day care says parents are removing kids due to state masking mandate*, ABC/WHAM (Sept. 16, 2021), <https://bit.ly/3y8ltMU>; Kailey Schuyler, *Parents pulling students out of school systems due to mask mandates*, WAFF/NBC (Aug. 15, 2021). The Mandate ignores that some experts, including the World Health Organization, have concluded mask wearing may not be in the best interest of children this young. The Mandate also subordinates students’ interest—the purpose of the Act—to the Administration’s vaccination and masking rules. *Coronavirus disease (COVID-19): Children and masks*, World Health Org. (Aug. 21, 2020), <https://bit.ly/3Gxzg2n>. The Mandate also ignores the best interest of speech- or language-impaired children, autistic children, and deaf children in experiencing a complete preschool education. *See, e.g.*, Deepa Shivaram, *New normal of masks is an 'added barrier' for deaf and hard-of-hearing community*, NBC News (May 23, 2020), <https://nbcnews.to/3pHBply>. Indeed, the Mandate never once mentions the interests of those students and the Mandate’s disparate impact on those populations. *But see* 42 U.S.C. §9836a(b)(2)(F) (“The measures under this subsection shall ...

provide for appropriate accommodations for children with disabilities.”). Finally, the Mandate utterly ignores another statutorily mandated factor—its disparate impact on rural areas. *See* 42 U.S.C. §9836a(a)(2)(B)(x) (HHS must “take into consideration ... the unique challenges faced by individual programs, including those programs that are seasonal or short term and those programs that serve rural populations”). Because the Mandate undermines the Act’s focus on providing children with education and care, it is arbitrary and capricious. *Louisiana*, 2021 WL 5609846, at *13 (“This is not the ‘reasoned decision-making’ required by the APA. Requiring COVID-19 vaccinations to healthcare workers covered by the mandate would hurt the patients the Social Security Act was meant to help.”).

Second, HHS failed to consider or arbitrarily rejected obvious alternatives to vaccine and masking requirements. Some emerging studies show that natural immunity affords benefits comparable to or better than vaccination. *See, e.g.*, Melissa Healy, *Study shows dramatic decline in effectiveness of all three COVID-19 vaccines over time*, L.A. Times (Nov. 4, 2021), <https://lat.ms/30hQIbj> (“As the Delta variant became the dominant strain of coronavirus across the United States, all three COVID-19 vaccines available to Americans lost some of their protective power, with vaccine efficacy among a large group of veterans dropping between 35% and 85%, according to a new study”); Sivan Gazit et al., *Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections*, Medrxiv (Aug. 25, 2021), <https://bit.ly/3DnKzIZ>; R. R. Goel et al., *mRNA vaccines include durable immunity to SARS-CoV-2 and variants of concern*, Science (Oct. 14, 2021), <https://bit.ly/3DXLS1K>. Additional studies support this conclusion.²

² For example, a highly reported study from Israel involving review of 74,000 cases of infection concluded that a person with natural immunity is 27 times less likely to be reinfected than a vaccinated person. *See* Sivan Gazit, Roei Shlezinger, et al., *Comparing SARS-CoV-2 natural*

HHS's rule is arbitrary because it fails to even consider or mention natural immunity as an alternative to vaccination or mask wearing. *See* Ex. S at 19-22. *Cf. Louisiana*, 2021 WL 5609846, at *13 (“The rejection of natural immunity as an alternative is puzzling.”); *see also BST Holdings*, 17 F.4th at 615 (“[A] naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus.”). And HHS did not engage with studies showing the declining effects of the vaccines over time. *See* Barbara A. Cohn, *SARS-Cov-2 vaccine protection and deaths among US veterans during 2021*, *Science* (2021) <https://bit.ly/307PLCP> (reporting that within six months, efficacy of vaccines against infection declined to 13% (Johnson & Johnson), 43% (Pfizer), and 58% (Moderna)); *see also* Ex. S.

Third, the Head Start Mandate is arbitrary and capricious because its rationales are flagrantly pretextual. As recounted above, the President has stated several times that the Head Start Mandate is part of a broader program aimed at increasing vaccination rates throughout American society, writ large. The Mandate however, eschews this rationale and tries (unsuccessfully and after-the-fact) to pigeonhole the Mandate into the Head Start Act's statutory factors. Such obvious regulatory reframing of the Mandate here leads to the inescapable conclusion that the Mandate's stated rationale is pretextual. And the presence of such blatant pretext is enough to render the Mandate arbitrary and capricious. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575-76 (2019); *see also Louisiana*, 2021 WL 5609846, at *14 (“[T]he 46-page CMS Mandate does not even mention President Biden's declaration of a national vaccine mandate. The presence of pretext is enough to render a rule arbitrary and capricious.”). What's more, as this Court has found, the Administration's shifting rationales across all vaccine mandates demonstrate pretext. *See*

immunity to vaccine-induced immunity: reinfections versus breakthrough infections, MEDRXIV (Aug. 30, 2021), <https://bit.ly/3GM82pb>; *see also* Compl. ¶¶94, 202.

Louisiana, 2021 WL 5609846, at *14. For example, the OSHA ETS declares that vaccines are necessary to protect worker safety. And the CMS Mandate purported to focus on patient safety. But those rationales would not be sufficient under the Head Start Act. So HHS manufactured a new rationale to cram the mandate into the Head Start Act. Accepting HHS's description of the Head Start Mandate requires this Court to "exhibit a naiveté from which ordinary citizens are free." *Dep't of Com. v. New York*, 139 S. Ct. at 2575-76.

Fourth, the Head Start Mandate completely ignores State reliance interests. Plaintiff States have reliance interests in the functioning of Head Start programs, which are often administered by public entities or interwoven with public school systems. *See* Exs. B-K, O-R. Specifically, the Mandate ignores: (1) the Plaintiff States' reliance interests in public and private Head Start programs continuing to operate under existing rules without facing this new Mandate that threatens to cause significant harm to the States' children, particularly those in rural communities; (2) Head Start providers' similar reliance interests in staffing their facilities under the existing rules without facing this new Mandate that threatens their workforce, the services they provide, and their very existence; and (3) Head Start workers' reliance interests, especially the interests of minority workers in rural communities, in selecting a job and building a career under the existing rules. The Mandate is arbitrary and capricious because it utterly ignores these reliance interests. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913-14 (2020).

Fifth, the Mandate fails to consider the uncertainty it imposes on providers due to the existence of potentially conflicting State provisions. The effects of such uncertainty are already being felt by providers. *See, e.g.,* Jeffrey S. Solocheck, *Head Start providers caught in crossfire of conflicting mask, vaccine rules*, Tampa Bay Times (Dec. 9, 2021), <https://bit.ly/3IT0NDA>. Due to the uncertainty surrounding the legality of the Head Start Mandate, particularly in the wake of

other mandates being enjoined, providers (especially smaller and rural providers without ready access to expert legal advice) face an excruciating practical conundrum about whether to follow State law or the likely void and illegal Head Start Mandate.

Sixth, the Mandate is arbitrary and capricious because it “is staggeringly overbroad.” *BST Holdings*, 17 F.4th at 615. Like the OSHA Mandate, the Head Start Mandate is “a one-size-fits-all sledgehammer that makes hardly any attempt to account for differences in” community measures, transmission levels, hospitalization levels, or levels of infection across communities. *Id.* at 612.

Seventh, HHS fails to account for the fact that Head Start students often go to the same school with students who are not in Head Start. HHS never considers the harms that will result from removing Head Start students from classrooms or facilities in order to allow other students to go unmasked, effectively segregating students and imposing stricter treatment on them because of their poverty level. It also doesn’t consider the alternative possibility that its Mandate will force programs to mandate masking on students who themselves are not part of the Head Start program, which would exacerbate all of the costs of the Mask Mandate and cause even more children to lose their preschool education.

Eighth, HHS failed to engage with other fundamental questions. It did not explain why it did not require children to wear masks in the Head Start program before now, including when case numbers were higher and everybody was unvaccinated and despite President-elect Biden stating in December 2020, that he would require masks “everywhere [he] can.” Joe Biden (@JoeBiden), Twitter (Dec. 9, 2020, 8:59 a.m.), <https://bit.ly/3dmWYC4>. HHS also did not explain why it would require masks now even though such a requirement was not mentioned in President Biden’s COVID-19 action plan, which described mandatory vaccination in Head Start and increased penalties for failing to abide by other mask mandates. *See* The White House, *Path Out of the*

Pandemic, <https://bit.ly/3adkMXx>. *But see Texas v. Biden*, 10 F.4th 538, 554 (5th Cir. 2021) (“[A]n agency must provide ‘a more detailed justification’ when a ‘new policy rests upon factual findings that contradict those which underlay its prior policy.’”).

D. The Head Start Mandate Violates the Treasury and General Government Appropriations Act of 1999.

The Mandate also violates Section 654 of the Treasury and General Government Appropriations Act of 1999, which requires that agencies “shall” prepare an impact assessment “[b]efore implementing policies and regulations that may affect family well-being.” Public Law 105-277, 5 U.S.C. §601 note. The impact analysis must meet several specific requirements including, among others, an assessment of whether the regulatory action “strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children,” whether “the action may be carried out by State or local government or by the family,” and whether “the action establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society.” 5 U.S.C. §601 note.

HHS acknowledges that Section 654 applies to the Head Start Mandate. *See* 86 Fed. Reg. at 68062. But HHS rejects the need for an impact assessment with the conclusory claim that the Mandate “will not have *any* impact on the autonomy or integrity of the family as an institution.” *Id.* (emphasis added). The Mandate, however, intrudes into fundamental decisions about whether a child must wear a mask or not at school, imposes obligations on parents picking children up from school, and goes straight to the heart of the allocation of power between State and family. The Mandate is therefore contrary to Section 654 of the Act and must be vacated.

E. The Mandate Violates the Nondelegation Doctrine, Spending Clause, Tenth Amendment, and Anti-Commandeering Doctrine.

The Head Start Mandate violates several constitutional provisions and doctrines.

First, the Mandate violates the Nondelegation Doctrine. The Constitution vests Congress with all legislative powers granted to the federal government. U.S. Const. art. 1, §1. “Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is vested.” *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935). If the Head Start Act authorizes the President to require Head Start programs to mandate vaccines and masks based on the amorphous term “such other standards as the Secretary finds to be appropriate,” this provision lacks an intelligible principle and is thus an unconstitutional delegation of legislative power to the Executive. *See Louisiana*, 2021 WL 5609846, at *15 (“If CMS has the authority by a general authorization statute to mandate vaccines, they have authority to do almost anything they believe necessary, holding the hammer of termination of the Medicare/Medicaid Provider Agreement over healthcare facilities and suppliers.”); *see also BST Holdings*, 17 F.4th at 611. Because the word “appropriate” is not an intelligible principle, §9836a(1)(E) is an unconstitutional delegation of legislative power, is void, and therefore cannot justify the Mandate. *See id.*; *see also Tiger Lily, LLC v. HUD*, 5 F.4th 666, 672 (6th Cir. 2021) (rejecting reading on delegation grounds that “would grant the CDC director near-dictatorial power for the duration of the pandemic, with authority to shut down entire industries as freely as she could ban evictions”).

Second, the Mandate violates the Tenth Amendment by intruding into two core areas of State police power. No clause of the Constitution authorizes the federal government to impose the Head Start Mandate. Education and public health have long been recognized as aspects of police powers reserved to the *States*, not the Federal Government. *See, e.g., BST Holdings*, 17 F.4th at 617 (“[T]o mandate that a person receive a vaccine or undergo testing falls squarely within the States’ police power.”); *Louisiana*, 2021 WL 5609846, at *15; *see also Hillsborough Cty. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985) (“[T]he regulation of health and

safety matters is primarily, and historically, a matter of local concern.”); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J.) (our Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the States “to guard and protect”); *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring); *accord id.* at 564 (majority op.); *Missouri v. Jenkins*, 515 U.S. 70, 131-32 (1995) (Thomas, J., concurring) (“We have long recognized that education is primarily a concern of local authorities.”).

The Mandate expressly conflicts with State laws, rules, and policies issued under their long-established police powers over education and public health. *See, e.g.*, Solochek, *supra*. And as with the CMS Mandate, the Head Start Mandate purports to expressly preempt State and local provisions. 86 Fed. Reg. at 68063; *cf. Louisiana*, 2021 WL 5609846, at *5 (“The CMS Mandate specifically preempts state laws with regard to COVID-19 Vaccine requirements and/or exemptions.”). By encroaching upon these inherent State powers, particularly without clear authorization from Congress, Defendants have exceeded their authority and violated the Tenth Amendment. *See Louisiana*, 2021 WL 5609846, at *15; *cf. BST Holdings*, 17 F.4th at 618 (“The States ... have an interest in seeing their constitutionally reserved police power over public health policy defended from federal overreach.”).

Third, the Mandate violates the Anti-Commandeering Doctrine by requiring State entities to enforce it. The Tenth Amendment and structure of the Constitution deprive Congress of “the power to issue direct orders to the governments of the States,” *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018), or to commandeer State entities “into administering federal law,” *Printz v. United States*, 521 U.S. 898, 928 (1997). The Mandate violates this doctrine by requiring State entities to enforce the Mandate against students, employees, and volunteers. By “conscript[ing]

state [agencies] into the national bureaucratic army,” the Mandate violates the Anti-Commandeering Doctrine. *NFIB v. Sebelius*, 567 U.S. 519, 585 (2012).³

Fourth, the Mandate violates the Spending Clause by conditioning the receipt of federal funds on enforcement of the Mandate. “[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.” *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The Head Start Act does not clearly authorize or unambiguously impose the Head Start Mandate. And there is no nexus between Head Start grants and vaccine or mask requirements. *Cf. South Dakota v. Dole*, 483 U.S. 203 (1987). Accordingly, the Head Start Mandate is an unconstitutional condition on the receipt of federal funds.

To avoid these grave constitutional issues, the Court must not adopt HHS’s expansive interpretation of §9836a. *See BST Holdings*, 17 F.4th at 618 (“[E]ven if the statutory language were susceptible to OSHA’s broad reading—which it is not—these serious constitutional concerns would counsel this court's rejection of that reading.”); *see also Tiger Lily*, 5 F.4th at 672 (“[T]o put ‘extra icing on a cake already frosted,’ the government’s interpretation of §264(a) could raise a nondelegation problem.”). But if the Court agrees with Defendants that the text of the §9836a does grant them unbounded discretion to impose a Head Start Mandate, §9836a is unconstitutional.

II. PLAINTIFF STATES WILL SUFFER IRREPARABLE HARM WITHOUT AN INJUNCTION.

“To show irreparable injury if threatened action is not enjoined, it is not necessary to demonstrate that harm is inevitable and irreparable.” *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986). Instead, plaintiffs need only show that they are “likely

³ This Court rejected Plaintiff States’ Anti-Commandeering challenge to the CMS Mandate because the Court was “unable to tell (at this point) whether and/or how many of the providers and suppliers are run by states” because Plaintiff States submitted “no evidence to prove the violation.” *Louisiana*, 2021 WL 5609846, at *15. Plaintiffs provide that evidence in this case. *See Exs. B, O.*

to suffer irreparable harm in the absence of preliminary relief.” *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). Here, the Head Start Mandate will cause the Plaintiff States to suffer an array of irreparable harms.

First, the Mandate causes irreparable monetary harm. When the federal government’s regulation imposes costs on a State, those costs constitute an irreparable injury. *Texas v. Biden*, 2021 WL 5882670, at *53 (5th Cir. Dec. 13, 2021). That is “because federal agencies generally enjoy sovereign immunity for any monetary damages,” so the State will never recover its losses. *Wages & White Lion Invs., L.L.C. v. F.D.A.*, 16 F.4th 1130, 1142 (5th Cir. 2021); *see also Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015). Indeed, as a general rule, “a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs.” *Texas v. E.P.A.*, 829 F.3d 405, 433 (5th Cir. 2016) (internal quotation marks omitted).

Here, the Mandate imposes costs on States because it will cause them to lose direct federal funding, cause public schools to lose federal funding, cause all public entities involved with Head Start—many of which will turn to States for additional funding—to spend their own money enforcing compliance and providing tests, and cause the States to spend more in public benefits as a result of children leaving the program and staff and parents becoming unemployed. *See* Exs. B, C, D, E, F, G, H, I, J, K, O, R; *see also* Ex. P at 2-3 (“the [Head Start] programs and classrooms themselves [are] funded with different sources of state, federal, and local dollars” and “costly [compliance] measures would have to come from our blended grant dollars and local funds as they are not covered costs by the federal government who is forcing us to comply”).

Second, the Mandate injures the States’ citizens and thereby injures the States’ *parens patriae* interests. A State may assert those injuries of its citizen in which it has a “quasi-sovereign interest.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). A

State has a paradigmatic sovereign interest in “the health and well-being—both physical and economic—of its residents in general.” *Id.* A State also has a sovereign interest in “assuring that the benefits of the federal system are not denied to its general population.” *Id.* at 608. The Mandate irreparably injures those interests because it will naturally and foreseeably cause a reduction in the availability of Head Start services due to lost staff—or the denial of funding to existing Head Start preschools due to noncompliance—and thereby deny families the benefits of the federal system. Exs. C-E. The widespread closure of Head Start programs will be devastating to the health and well-being of each State’s residents. Exs. F, J, K, P. The Mandate will also place a substantial burden on the liberty interests of the preschool staff who must within weeks decide to either submit to vaccination or lose their jobs. Exs. L, M, N, O, Q. It further burdens the liberty interests of the toddlers who must submit to masking. Exs. T, G, I.

Third, the Mandate injures the States’ sovereign interests by purporting to preempt their laws. An injury to a State’s sovereign interest is “necessarily” irreparable. *See, e.g., Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013). A State’s interest in “in not being pressured to change its law” is sufficiently “related to its sovereignty” for these purposes. *Texas v. United States*, 787 F.3d 733, 752 n.38 (5th Cir. 2015); *see also Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017). Here, Plaintiff States will have to change their own laws and policies to comply with the Mandate. For example, in Louisiana, parents and students would be denied their State law right to opt-out of a vaccine requirement for any reason. *See* La. R.S. 17:150(E). In other States, such as Montana, Alabama, and Florida, Programs would be placed in direct conflict with state law prohibitions on vaccine mandates. *See* Mont. H.B. 702 (2021); Ala. Act. 2021-493 §1(a); Fla. H.B. 1B (2021).

Fourth, the States will suffer the irreparable injury of the deprivation of their statutorily guaranteed procedural rights. A plaintiff has a “cognizable injury if it has been deprived of a procedural right to protect its concrete interests.” *Texas v. Equal Emp’t Opportunity Comm’n*, 933 F.3d 433, 447 (5th Cir. 2019) (quotations and alterations omitted). And “[a] violation of the APA’s notice-and-comment requirements is one example of a deprivation of a procedural right.” *Id.* Here, the States were denied their procedural right to notice and comment under the APA, which exists to protect their wide range of concrete interests in avoiding the Mandate. If the procedurally defective Mandate remains in effect, they will have no remedy.

III. AN INJUNCTION WOULD NOT HARM DEFENDANTS OR DISSERVE THE PUBLIC INTEREST.

Finally, the public interest and balance of equities weigh in favor of granting a preliminary injunction. Simply put, Defendants “have no legitimate interest in the implementation of [the] unlawful” Head Start Mandate. *Texas*, 2021 WL 723856, at *49. Instead, “the public is served when the law is followed.” *Id.* at *51 (quoting *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013)). As the Fifth Circuit recently reaffirmed, “the public interest is in having governmental agencies abide by the federal laws that govern their existence and operations.” *Wages & White Lion*, 16 F.4th at 1143 (cleaned up). And “there is generally no public interest in the perpetuation of unlawful agency action.” *Id.* And while Plaintiff States would be irreparably harmed by the implementation of the Mandate, the only harm to the Defendants from an injunction would be to wait for an actual grant of authority. Accordingly, the public interest and balance of harms weigh heavily in Plaintiff States’ favor.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff States’ Motion for a Preliminary Injunction.

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